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INTELLECTUAL PROPERTY— RIGHTS UNDER SIEGE

David A. Anderson* and Raymond P. Niro**

Messrs. Anderson and Niro survey and comment on the recent erosion of intellectual property rights. Focusing on the area of trade secrets, the authors point out the effective elimination of trade secret rights in the United States Sixth Circuit. They assess developments in the law of patents with special emphasis on the burgeoning field of computer programs, violations of the Sherman Anti-Trust Act and the estoppel doctrine in class action infringement suits. They survey recent developments in copyright law focusing on the Supreme Court decision in Goldstein v. California. The authors criticize anti-intellectual property attitudes held by state and federal courts and warn of further erosion unless affirmative judicial and legislative action is taken.

That every novel idea whose realization or development can become useful to society belongs primarily to him who conceived it and that it would be a violation of the rights of man in their very essence if an industrial invention were not regarded as the property of its creator.—*Preamble to the French Patent Law of 1791*—

ALTHOUGH the right of a creator to the possession and use of his ideas has been considered a fundamental proposition of the natural laws of society,¹ recent decisions in the intellectual property field reflect a growing tendency to erode this right. In the patent law, for example, the rising rate at which patents are being held invalid by the courts has prompted three of the most eminent patent law professors in the nation to observe that at least one of the judicial circuits may well have “eliminated the United States Patent System from its law.”²

The statistics which support that observation speak for themselves. From January 1, 1953, when the Patent Act of 1952 be-

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1. R. ELLIS, *TRADE SECRETS* 19 (1953). The absolute right of a creator to his ideas can be traced at least as far back as the Roman Law where the master was granted protection against third persons who corrupted his slave into betraying his trade secrets. Schiller, *Trade Secrets and the Roman Law: The Actio Servi Corrupti*, 30 COLUM. L. REV. 837, 839 (1930).

2. D. DUNNER, J. GANDRELL & S. WHITE, *PATENT LAW PERSPECTIVES*, Developments § A.1[1] Rel. No. 3 (Feb. 1971).

came effective, until June, 1971, the Court of Appeals for the Eighth Circuit had occasion to decide the validity of 46 patents. Of these, the court held 42 invalid³ with only one of the 46 litigated patents surviving a final adjudication of validity and infringement.⁴ It is difficult, if not impossible, to imagine a similar circumstance occurring in the real property law. If 42 out of 46 landowners found, after filing actions for trespass, that title to their property had been judicially declared null and void, a suggestion that a crisis had occurred in the law would be an understatement.

Yet, for owners of intellectual property, the high patent invalidity rates pose only a portion of the problem they face. While it might be regarded as mere conjecture to observe that the Court of Appeals for the Eighth Circuit has "eliminated the United States Patent System from its law," there can be absolutely no doubt that the Court of Appeals for the Sixth Circuit has already, in fact, eliminated trade secret law from its jurisprudence. In May, 1973, that court held that the Constitution and patent laws of the United States preempt and make ineffective state trade secret laws which prohibit the unlawful misappropriation, disclosure and use of trade secrets.⁵ That decision came on the heels of five other decisions, by five other courts of appeals, which expressly rejected the preemption concept fashioned by the Sixth Circuit.⁶

Thus, the creator of intellectual property now faces a practical dilemma that is unquestionably more real than imagined. On the one hand, he can elect to maintain his creative efforts as a trade secret in the hope that the Supreme Court will reverse the Sixth

3. These statistics have been compiled from the decisions reported in Federal Reporter, Second Series. See also I. KAYTON, *THE CRISIS OF LAW IN PATENTS AND TRADE SECRETS* (1970).

4. *Wm. F. Crome & Co. v. Vendo Co.*, 299 F.2d 852 (8th Cir. 1962). In June, 1971, the Eighth Circuit altered the statistics slightly by holding another patent valid. *Woodstream Corp. v. Herter's, Inc.*, 446 F.2d 1143 (8th Cir. 1971). But since that time, the invalidity trend has continued. Four additional patents have been litigated before the Eighth Circuit. Three were held invalid, and the other held infringed, after the defendant conceded the validity question.

5. *Kewanee Oil Co. v. Bicron Corp.*, 478 F.2d 1074 (6th Cir.), *cert. granted*, 42 U.S.L.W. 3194 (U.S. Oct. 9, 1973) (No. 73-187).

6. *Painton & Co. v. Bourns, Inc.*, 442 F.2d 216 (2d Cir. 1971); *Dekar Industries, Inc. v. Bissett-Berman Corp.*, 434 F.2d 1304 (9th Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *Water Services Inc. v. Tesco Chemicals, Inc.*, 410 F.2d 163 (5th Cir. 1969); *Servo Corp. of America v. General Electric Co.*, 337 F.2d 716 (4th Cir. 1964), *cert. denied*, 383 U.S. 934 (1966). See also *Bendix Corp. v. Balax, Inc.*, 421 F.2d 809, 821 (7th Cir.), *cert. denied*, 399 U.S. 911 (1970).

Circuit preemption doctrine. Alternatively, he can elect to obtain patent protection for his creative efforts, and run the risk of seeking to enforce his patent, perhaps by necessity,⁷ in a forum that is statistically hostile to his cause. Understandably, neither alternative can possibly offer any sense of comfort to the creator of intellectual property.

It is the purpose of this survey of recent developments in the law of intellectual property⁸ both to examine the apparent erosion of intellectual property rights in this country and to suggest, where possible, some new directions that might abate the erosion.

I. TRADE SECRETS IN LIGHT OF *Kewanee*

On at least two occasions in the past eight years, the Illinois Supreme Court has expressly recognized the common law right of an individual to possess, use and enjoy the benefits of his trade secrets.⁹ The court sustained injunctions prohibiting the wrongful use of trade secrets for periods at least as long as that required "to discover or reproduce the information by lawful means."¹⁰ It imposed liability for trade secret misappropriation even where the wrongful taking occurred by committing the trade secrets to memory from "constant exposure"¹¹ rather than through an actual taking of physical materials. Indeed, the court also sustained an injunction against the sale of an entire device, even though the misappropriated trade se-

7. Contrary to popular belief, a patent owner does not have a high degree of choice in selecting a forum in which to litigate his patent. As a plaintiff, in an infringement suit, he must abide by the special venue statute for patent infringement suits, which limits the place of suit to "the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established business." 28 U.S.C. § 1400(b) (1970). Yet, as a defendant, in a declaratory judgment action for patent invalidity, the patent owner, according to the Court of Appeals for the Eighth Circuit, is subject to personal jurisdiction by merely sending a letter threatening suit for infringement to a resident of the forum. *B & J Mfg. Co. v. Solar Indus., Inc.*, — F.2d —, 42 U.S.L.W. 2105 (8th Cir. Aug. 28, 1973).

8. The greatest volume of cases dealing with intellectual property law are decided in the federal courts. By necessity, therefore, the most significant new developments in the field, although they affect Illinois citizens, Illinois business and Illinois case and statutory law, do not typically arise in the state courts of Illinois.

9. *ILG Indus., Inc. v. Scott*, 49 Ill. 2d 88, 273 N.E.2d 393 (1971); *Schulenburg v. Signatrol, Inc.*, 33 Ill. 2d 379, 212 N.E.2d 865 (1965).

10. 49 Ill. 2d at 97, 273 N.E.2d at 398.

11. 33 Ill. 2d at 387, 212 N.E.2d at 869.

crets related solely to select components embodied in the device.¹²

While the Illinois Supreme Court has merely endorsed the common law right of ownership and use of trade secrets, the Illinois legislature has enacted laws making the theft of trade secrets a crime.¹³ At least twenty other state legislatures have also supplemented their common law by enacting statutes which prohibit and criminally punish the misappropriation of trade secrets.¹⁴ Thus, in Illinois, as in most other states, both the common law and the statutory law evidence a continued recognition that trade secrets are a viable form of intellectual property.

The extent to which that viability will continue, however, is now in the hands of the United States Supreme Court. In May, 1973, the Court of Appeals for the Sixth Circuit held, in *Kewanee Oil Co. v. Bicron Corp.*,¹⁵ that

our analysis of the relationship between the Patent Laws of the United States and the Trade Secret Laws of the State of Ohio, as applied in this case, forces us to the conclusion that the field of protection afforded to this plaintiff by that Trade Secret Law has been preempted by the Patent Laws of the United States. We, therefore, hold that the Trade Secret Laws of the State of Ohio may not afford to the plaintiff in this case protection which the plaintiff could not obtain under the Patent Laws.¹⁶

The implications of the *Kewanee* decision can be best understood through a brief analysis of the factual setting in which the court fashioned its preemption doctrine. Beginning in 1949, and continuing for seventeen years thereafter, the plaintiff, Kewanee, developed a

12. 49 Ill. 2d at 95, 273 N.E.2d at 397.

13. ILL. REV. STAT. ch. 38, §§ 15-1 to 15-9, 16-1 (1971).

14. ARK. STAT. ANN. §§ 41-3949 to 41-3951 (Supp. 1971); CAL. PENAL CODE § 499c (West 1972); COLO. REV. STAT. § 40-5-33 (Supp. 1969); GA. CODE § 26-1809 (1972); IND. ANN. STAT. §§ 10-3048 to 10-3052 (Supp. 1972); ME. REV. STAT. ANN. tit. 17, § 2113 (Supp. 1972); MASS. GEN. LAWS ch. 266 §§ 30(4), 60A (1967); MICH. COMP. LAWS §§ 752.771 to 752.773 (Supp. 1968); MINN. STAT. ANN. § 609.52 (Supp. 1973); NEB. REV. STAT. §§ 548.01 to 548.03 (Supp. 1972); N.H. REV. STAT. ANN. § 580:32 (Supp. 1972); N.J. STAT. ANN. §§ 2A:119-5.1 to 119-5.5 (1969); N.M. STAT. ANN. § 40A-16-23 (1972); N.Y. PENAL LAWS § 155.00(6), 155.30(3), 165.07 (McKinney 1967); N.C. GEN. STAT. § 14-75.1 (1969); OHIO REV. CODE ANN. §§ 1333.51 to 1333.99(E) (Page 1972); OKLA. STAT. tit. 21, § 1732 (Supp. 1972); PA. STAT. tit. 18, § 4899.2 (Supp. 1973); TENN. CODE ANN. §§ 21-4238 to 21-4240 (1967); WIS. STAT. ANN. § 943.205 (Supp. 1973).

15. 478 F.2d 1074 (6th Cir.), cert. granted, 42 U.S.L.W. 3194 (U.S. Oct. 9, 1973) (No. 73-187).

16. *Id.* at 1087.

body of secret technology in the field of synthetic crystal growth.¹⁷ In the words of the court: “[i]t was an accomplishment which no other competitor had achieved.”¹⁸

Each of the individual defendants was a former employee of Kewanee. Each was bound by an employment contract which prohibited the disclosure and use of Kewanee’s trade secrets. Each also had a particular skill in some aspect of Kewanee’s secret crystal-growing technology.¹⁹ While it took Kewanee over sixteen years to perfect its crystal growth processes and manufacturing techniques, the defendants, and the new company they formed, did it in a mere nine months.²⁰

Thus, the court had before it the classic trade secret case: former employees, bound by employment contracts and having access to their former employer’s trade secrets, form a competitive enterprise, which accomplishes technical feats in months that required years of effort on the part of their former employer. Even the court itself recognized the basic impropriety of the defendants’ activities, by observing that

[t]here can be no question on this record but what these individual defendants appropriated, to the benefit of Bicon, Harchaw’s secrets, processes, procedures and manufacturing techniques.²¹

Although the court recognized the basic impropriety of the defendants’ misappropriation, it seized upon two facts to support its conclusion that the imposition of sanctions against the defendants would be inappropriate. First, it was admitted by Kewanee that the trade secrets may have been patentable.²² Secondly, it was admitted that the trade secrets had been used (although secretly)

17. *Id.* at 1076.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1076-77. The court went on to note that were the Ohio Trade Secret Law not preempted, it would have affirmed the judgment of the lower court. *Id.* at 1077-78.

22. *Id.* at 1078. A patent can only be obtained on a new and useful process, machine, manufacture or composition of matter. 35 U.S.C. § 101 (1970). In contrast, a trade secret might include non-patentable subject matter such as plans, specifications, technical “know-how,” non-technical internal business operating methods, market research studies, and lists of customers and suppliers. RESTATEMENT OF TORTS § 757, comment b (1938); Schreyer v. Casco Prod. Corp., 97 F. Supp. 159, 168 (D. Conn. 1951), *modified*, 190 F.2d 921 (2d Cir. 1951), *cert. denied*, 342 U.S. 913 (1952).

more than a year prior to the commencement of suit by Kewanee.²³ From these two facts and a simplistic analysis of federal patent policies, the court reasoned: (1) that Kewanee could have sought patent protection for its trade secrets, but did not; (2) that Kewanee was now foreclosed from seeking patent protection because of its own secret use; and (3) that Kewanee could not "exclude competition and prevent disclosure [of its trade secrets]"²⁴ through application of the Ohio trade secret law, because it had lost its right to obtain a patent for the same secret subject matter.

Although the simplicity of the court's reasoning is appealing, the decision itself is simply wrong, both in its logic and its philosophy. Congress, not the Court of Appeals for the Sixth Circuit or the Supreme Court, enacted the patent laws. Indeed, the right of Congress to enact those laws is granted directly by the Constitution²⁵ What better source to look to, then, in discovering the possibility of conflict between the patent laws and the state trade secret laws, than the actions of the Congress?

23. *Id.* at 1078. The patent law provides, *inter alia*, that a patent may not issue on an invention which has been in *public use* or on sale more than one year prior to the filing date of an application for patent. 35 U.S.C. § 102(b) (1970).

24. *Id.* at 1086.

25. Art. I, sec. 8, clause 8 of the Constitution provides: "The Congress shall have the Power To promote the Progress of Science and the useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". . . .

26. The Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1970) prohibits federal agency disclosure of trade secrets. The Securities and Exchange Act of 1934, 15 U.S.C. § 78x(a) (1970) prevents the SEC from seeking the disclosure of trade secrets. The Federal Trade Commission Act, 15 U.S.C. § 46(f) (1970) prohibits the publication of trade secrets obtained by the agency. Section 205 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (Supp. I, 1971) requires agency respect for the integrity of trade secrets. The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(j) (1970) prohibits persons from using or revealing trade secrets. The Radiation Control for Health and Safety Act of 1968, 42 U.S.C. § 2631(e) (1970), which prohibits disclosure of any "information which contains or relates to a trade secret." The Wholesome Poultry Products Act, 21 U.S.C. § 458(a)(5) (1970) prohibits use of disclosure of trade secrets by persons acquiring such information pursuant to the Act. The Air Quality Act of 1967, 42 U.S.C. § 1857c-9(c) (1970), permits witnesses testifying at public hearings to refuse to divulge trade secrets or secret processes. The Flammable Fabrics Act, 15 U.S.C. § 1193(c) (1970), prohibits the Secretary of Commerce from revealing information containing or relating to trade secrets. The Clean Water Restoration Act of 1966, 33 U.S.C. § 1160(f)(2) (1970), authorizes persons required to file reports on water pollution to refuse to divulge "trade secrets or secret processes" in such reports. The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1401(e) (1970), prohibits the Secretary of Health, Education and Welfare from disclosing trade secrets.

But, the court in *Kewanee* neglected to even make that inquiry. If it had, it would have found that Congress has enacted no less than twelve laws, since the last revision of the patent laws in 1952, that expressly recognize and protect trade secrets.²⁶ Congress, for example, has made it a federal crime for a federal employee to disclose a trade secret.²⁷ It has recognized trade secrets as property subject to capital gains treatment.²⁸ The definition of "stolen goods" in the National Stolen Property Act has been interpreted to include trade secrets.²⁹ Congress has even empowered the Secretaries of Interior and Health, Education and Welfare to acquire trade secrets from others by "purchase, license, lease or donation."³⁰ Indeed, the patent laws themselves provide that "[a]pplications for patents shall be kept in confidence by the Patent Office,"³¹ so that an inventor who is unsuccessful in obtaining a patent may maintain his invention in secret. Yet, in formulating its impressions of patent law "policies and purposes" that support a preemption theory, the court in *Kewanee* overlooked the best evidence that Congress certainly intended no preemption—Congress' own numerous expressions that patents and trade secrets are compatible.

In addition to running afoul of clear expressions of congressional policy concerning trade secrets, the court in *Kewanee* also failed to consider existing policies of the executive branch of the federal government,³² a host of existing treaties,³³ and even the

27. 18 U.S.C. § 1905 (1970).

28. 26 U.S.C. §§ 1221-23 (1970). See *E.I. duPont de Nemours & Co. v. United States*, 288 F.2d 904 (Ct. Cl. 1961) and *Pickren v. United States*, 378 F.2d 595 (5th Cir. 1967).

29. 18 U.S.C. §§ 2314-2315 (1964). *United States v. Bottone*, 365 F.2d 389 (2d Cir. 1966).

30. Air Quality Act of 1967, 42 U.S.C. § 1857b-1(b)(4) (1970); Act to Develop the Commercial Fishing Industry, 16 U.S.C. § 778e(e) (1970); Act to Provide Synthetic Liquid Fuels from Coal and Oil Shale, 30 U.S.C. § 322(b) (1970).

31. 35 U.S.C. § 122 (1970).

32. The procurement regulations of the Department of Defense and the National Aeronautics and Space Agency recognize and provide for the use, acquisition and protection of trade secrets. *Armed Services Procurement Regulations*, 32 C.F.R. §§ 1 to 30 (1973), and *NASA Procurement Regulations*, 14 C.F.R. § 1245 (1973).

33. The Convention of Paris, Article 10^{bis}(2), October 31, 1958, [1962] 13 U.S.T. 1, T.I.A.S. No. 4931 and the General Inter-American Convention for Trade Mark and Commercial Protection, February 20, 1929, 46 Stat. 2907, two treaties to which the United States is a party, prohibit acts "contrary to honest practices in

long-standing policy expressions of the Supreme Court,³⁴ all of which support a conclusion that patents and trade secrets are fully compatible. Thus, if a meaningful criticism can be leveled at the court's decision in *Kewanee*, it is that the court struck down a significant area of intellectual property rights, without the "fully focused inquiry"³⁵ suggested by the Supreme Court, and without the slightest appreciation for the practical consequences of its decision.

Courts could engage in a philosophical debate over the practical significance of trade secret rights indefinitely without reaching an accord on the exact value of trade secret rights in the United States. But these practical implications cannot simply be ignored, as done in *Kewanee*. Rather, they must be considered and weighed before more than a century of coexistence between patents and trade secrets is abolished.

The Court of Appeals for the Second Circuit, for example, in *Painton & Co. v. Bourns, Inc.*³⁶ sensed the commercial significance of trade secret rights in observing that;

In thousands of contracts businessmen have divulged such secrets to competitors, dealing at arms' length and well able to protect themselves, on

industrial and commercial matters" and acts "contrary to commercial good faith or to the normal and honorable development of industrial or business activities." See *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 160 n.9 (1940) and *Stauffer v. Exley*, 184 F.2d 962 (9th Cir. 1950). See also *Agreements To Facilitate The Interchange of Patent Rights and Technical Information for Defense Purposes*, Belgium, Oct. 12, 1954, [1954] 5 U.S.T. 2318, T.I.A.S. No. 3093; Denmark, Feb. 19, 1960, [1960] 11 U.S.T. 148, T.I.A.S. No. 4423; France, Mar. 12, 1957, [1957] 8 U.S.T. 353, T.I.A.S. No. 3782; Germany, Jan. 14, 1956, [1956] 7 U.S.T. 45, T.I.A.S. No. 3478; Greece, June 16, 1955, [1955] 6 U.S.T. 2173, T.I.A.S. 3286; Italy, Oct. 3, 1952, [1961] 12 U.S.T. 189, T.I.A.S. No. 4693; Japan, Mar. 22, 1956, [1956] 7 U.S.T. 1021, T.I.A.S. No. 3585; Netherlands, April 29, 1955, [1955] 6 U.S.T. 2187, T.I.A.S. No. 3287; Norway, April 6, 1955, [1955] 6 U.S.T. 799, T.I.A.S. No. 3226; United Kingdom, Jan. 19, 1953, [1953] 4 U.S.T. 150, T.I.A.S. No. 2773.

34. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178 (1933); *E.I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Fowle v. Park*, 131 U.S. 88 (1889); *Patterson v. Kentucky*, 97 U.S. 501 (1878); *Peabody v. Norfolk*, 98 Mass. 452 (1868).

35. The court simply ignored Justice Harlan's admonition in *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), where the identical preemption concept was considered and rejected. There the Court refused to "define in even a limited way the extent, if any, to which the States may properly act to enforce the contractual rights of inventors of unpatented secret ideas." *Id.* at 675. Indeed, the Supreme Court in *Lear* specifically recognized the "difficulty and importance" of the task and held that it should be undertaken only after a "fully focused inquiry" by state courts. *Id.*

36. 442 F.2d 216 (2d Cir. 1971).

the faith that mutually acceptable provisions for payment, for the preservation of confidentiality, and for the return of the secret information on termination or default will be enforced by the courts.

. . . .

*The district judge cited no data to prove that licensing of trade secrets had worked adversely to the public interest. To the contrary, such facts as have been brought to our notice indicate that the sharing of technological know-how on the basis of proper agreements has been beneficial not only within this country but in its relations with others.*³⁷

Foreign companies have expended millions of dollars in obtaining American trade secret rights.³⁸ Conversely, American industry undoubtedly spends millions annually to obtain foreign technology protected only by trade secret rights. Yet, it is hard to imagine any continued foreign interest either in paying for access to non-existent American trade secret rights or in licensing foreign trade secret rights to American industry, should the *Kewanee* decision become the law of the land.³⁹

Finally, it should be noted that the *Kewanee* decision is based upon a fundamental misunderstanding of the differences between patent and trade secret rights and the reason for their continued co-existence under the laws of virtually all industrial nations. Consistent with the tenor of the Constitution, a United States patent grants exclusive rights for a fixed duration—the right to exclude all others from using the invention for seventeen years. The condition precedent to obtaining this grant is the disclosure of the invention to the public.⁴⁰ Disclosure, however, is not required until the inventor accepts the patent.⁴¹

37. *Id.* at 225-226 (emphasis added). The court also took judicial notice of the fact that the loss in "foreign dollar payments [to the United States] might run as high as \$1 billion annually" if trade secret rights in the United States are struck down. *Id.* at 226 n.7.

38. *See, e.g.,* Imperial Chem. Indus., Ltd. v. National Distillers & Chem. Corp., 342 F.2d 737, 744 (2d Cir. 1965), where Toyo of Japan agreed to pay approximately six million dollars for technology in the polyethylene reactor field.

39. A foreign owner of trade secret rights undoubtedly would know that an American licensee of secret technology could not agree to maintain the requisite element of secrecy in his commercial transactions in the United States. Indeed, under *Kewanee*, the American licensee could not ever enjoin former employees either from using or disclosing such trade secrets, even though such use or disclosure would injure both the foreign trade secret owner and the American licensee.

40. *Graham v. John Deere Co.*, 383 U.S. 1, 9 (1966); *Grant v. Raymond*, 31 U.S. (6 Pet.) 217, 240-42 (1832).

41. While pending in the Patent Office the patent application is maintained in secrecy. 35 U.S.C. § 122 (1970). When the patent application is "allowed," the

A trade secret, on the other hand, carries no exclusive rights. One cannot exclude others from using a trade secret, unless there has been a violation of a contractual obligation or an unlawful misappropriation. One who learns the secret independently—whether by accident, by independent invention or discovery, or by inspection of the goods on the open market—cannot be excluded from use or disclosure of the secret. Indeed, as Mr. Justice Holmes noted in *E. I. du Pont de Nemours Powder Co. v. Masland*,⁴² the essence of all trade secret rights is the existence of a confidential relationship between the trade secret owner and the alleged misappropriator.

Thus, the owner of a patent can exclude anyone from the manufacture, use or sale of his patented invention—whether the infringing subject matter was developed independently or not. A trade secret owner, on the other hand, must stand on the confidential relationship between himself and the misappropriator. He has no rights against the honest independent developer of the identical technology. Indeed, his rights extend only to those who wrongfully take his technology and then only so long as the technology has been kept secret and not become part of the public domain.⁴³

The obvious consequence of the *Kewanee* decision, therefore, is that all technology that is possibly subject to patent protection can no longer be maintained as a trade secret. For the Illinois citizen, it means that he cannot allow at least the patentable portion of his secret technology to be exposed to misappropriation in the Sixth Circuit. Indeed, if his former employees begin a competitive business enterprise in Ohio based upon his trade secrets, he cannot hope to enjoin the disclosure or use of his trade secrets at all. The

Patent Office advises the applicant that his claims are acceptable, and the applicant may then pay the final fee for issuance of the patent or decline to pay the final fee whereupon the application is abandoned but maintained in secrecy. Rules 311-317, RULES OF PRACTICE IN PATENT CASES (1970). Thus an inventor does not decide whether he will accept a patent, in lieu of what may be a trade secret, until he knows the scope of his protection.

42. 244 U.S. 100, 102 (1917).

43. The requirement that trade secret rights are enforceable only if the subject matter was secret at the time of the wrongful taking fully distinguishes the *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) cases relied upon by the court in *Kewanee*. In both cases, the Supreme Court held that state unfair competition laws could not be used to prevent one from copying that which was in the *public domain*. But, by definition, a trade secret right is not enforceable if it is no longer secret.

Kewanee decision also means that the Illinois industrialist will have to be twice as persuasive to obtain rights under foreign technology that is subject to foreign trade secret protection because of the inherent risk that the foreign trade secret rights will be lost through sanctioned misappropriation in the Sixth Circuit.

The ultimate answer to this dilemma lies with the Supreme Court. The choice is clear. *Kewanee* can be affirmed and the trade secret laws of all the States can be judicially repealed. Or alternatively, *Kewanee* can be reversed, and the Sixth Circuit can be saved from becoming a haven for trade secret misappropriation.

II. PATENT LAW

A. Computer Programs

In a tortured and poorly reasoned opinion, the Supreme Court held in *Gottschalk v. Benson*⁴⁴ that patent protection could not be obtained on a program for a digital computer. This subject has given rise to great controversy in recent years, largely because of the opposition of the Patent Office⁴⁵ and the large computer manufacturers⁴⁶ to the granting of such patents.

The opposition of the Patent Office appears to result largely from the simple fact that it is not equipped to competently examine applications in this field. This position received a significant boost in 1966 from the President's Commission on the Patent System, which came out flatly against the patenting of programs, primarily on the basis of administrative convenience.⁴⁷

44. 409 U.S. 63 (1972).

45. *Guidelines for Examination of Programs*, 829 OFFICIAL GAZETTE (1972); cf. Bender, *Computer Programs: Should They Be Patentable?*, 68 COLUM. L. REV. 241, 255-57 (1968).

46. Several large computer manufacturers have filed briefs as amici curiae in cases before the United States Court of Customs and Patent Appeals, opposing the patenting of programs. In *Gottschalk*, amicus briefs opposing patent protection were filed in the Supreme Court by IBM, Burroughs, Honeywell, and the Business Equipment Manufacturers' Association. No computer manufacturers urged that programs should be patentable.

47. REPORT OF THE PRESIDENT'S COMMISSION ON THE PATENT SYSTEM, TO PROMOTE THE PROGRESS OF USEFUL ARTS IN AN AGE OF EXPLODING TECHNOLOGY 12 (1966). The Commissioner also made the unsupported statement that the creation of programs "has undergone substantial and satisfactory growth in the absence of patent protection," and noted that "copyright protection is presently available." The conclusion of "satisfactory growth", however, is questionable. See Bender, *Computer Programs: Should They Be Patentable?* 68 COLUM. L. REV. 241 (1968).

Despite the opposition of the Patent Office and the President's Commission, the United States Court of Customs and Patent Appeals (C.C.P.A.), in a series of cases,⁴⁸ began reversing the Patent Office's rejections of program applications, which were generally based upon the position that these applications would cover unpatentable "mental steps" or processes that could be carried out in the human mind.

Although the Supreme Court reversed the C.C.P.A., its opinion is an illogical quagmire that leaves the area in doubt. Shortly after the opinion came down, it was optimistically suggested that patents on computer programs were "not ruled out entirely."⁴⁹ It was reported to one of the authors that there are even those who have interpreted the opinion as a *mandate* for patents on computer programs. Indeed, the C.C.P.A. itself has recently reversed the rejection of a program application which defined the invention of a program application which defined the invention as a new apparatus—the programmed computer.⁵⁰ However, the central issue of *Gottschalk*—the patentability of an invention involving "mental steps"—was not before the C.C.P.A. in that case.

Hopefully, Congress will step in and take the necessary action to permit the patenting of computer programs. If it does, growth in the field is bound to increase through the increased level of information interchange resulting from the inclusion of computer programs in the patent system.⁵¹

B. Patent-Antitrust

Undoubtedly, the most significant and far-reaching decision in

Furthermore, copyright protection is simply unsatisfactory; Comment, *Software Protection: Patents, Copyrights, and Trade Secrets*, 35 ALBANY L. REV. 695 (1971).

48. *In re Benson*, 441 F.2d 682 (C.C.P.A. 1971), *rev'd sub nom.*, *Gottschalk v. Benson*, 409 U.S. 63 (1972); *In re Mahoney*, 421 F.2d 742 (C.C.P.A. 1970); *In re Bernhart*, 417 F.2d 1395 (C.C.P.A. 1969); *In re Prater*, 415 F.2d 1378 (C.C.P.A. 1968), *modified*, 415 F.2d 1393 (C.C.P.A. 1969).

49. *Mainframe Makers Hail High Court Rule*, 17 ELECTRONIC NEWS, Nov. 27, 1972, at 28.

50. *In re Knowlton*, — F.2d — (C.C.P.A. 1973), discussed in BNA PATENT TRADEMARK & COPYRIGHT JOURNAL, No. 139, p. A-1 (Aug. 2, 1973).

51. Secrecy has already become the norm in the computer program field. See Bender, *Trade Secret Protection of Software*, 83 GEO. WASH. L. REV. 909 (1970); Comment, *Software Protection: Patents, Copyrights and Trade Secrets*, 35 ALBANY L. REV. 695 (1971); "License Agreement for IBM Program Products," THE LAW OF SOFTWARE, 1969 Proceedings, p. C-1 at C-2.

the patent-antitrust field is that of the Supreme Court in *United States v. Glaxo Group Ltd.*⁵² This case involved an action under section 1 of the Sherman Act⁵³ in which the government charged that contractual restrictions on the bulk sale and resale of a drug called griseofulvin were an unlawful restraint of trade. These restrictions were contained in a patent pooling agreement between Imperial Chemical Industries, Ltd. (ICI) and Glaxo. The government in a test of its right to do so, challenged the validity of the underlying patents. The district court held the agreement to be a per se violation of the Sherman Act, but struck down the challenge to validity because the parties did not rely on the patents in defense of the antitrust claim.

The Supreme Court reversed the district court, holding for the first time that the government, in the context of an antitrust case, may also challenge the validity of a patent under certain conditions, regardless of whether or not the owner relies on the patent in defense of an antitrust action. In taking this position, the Court observed that Glaxo and ICI had opposed compulsory patent licensing below on the grounds that such relief would “‘deny defendants an essential ingredient of their rights under the patent system,’ and that there was no warrant for such a drastic forfeiture of their rights.”⁵⁴ The Court stated that this position of the defendants was all the more reason to permit a challenge to validity:

In this context, where the court would necessarily be dealing with the future enforceability of the patents, we think it would have been appropriate, if it appeared that the Government's claims for further relief were substantial, for the court to have also entertained the Government's challenge to the validity of those patents.⁵⁵

The Court recognized, however, that it was not giving the government sweeping power to challenge patent validity “of any patent lurking in the background of an antitrust case.”⁵⁶ Nevertheless, where the fashioning of effective relief involves a question of patent validity, the Court stated that it could “perceive no good reason, either in terms of the patent system or of judicial administration, for refusing to hear and decide it.”⁵⁷

52. 410 U.S. 52 (1973).

53. 15 U.S.C. § 1 (1970).

54. 410 U.S. at 59.

55. *Id.*

56. *Id.*

57. *Id.* at 60.

Glaxo is clear evidence of a trend marked by the Supreme Court decisions in *Walker Process Equipment, Inc. v. Food Machinery Chemical Corp.*,⁵⁸ in *Lear, Inc. v. Adkins*,⁵⁹ and in *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*⁶⁰ toward a strong policy favoring the testing of the validity of patents and the removal of invalid patents as a possible obstacle to free competition. Although the Court requires a substantial relationship between the validity issue and the fashioning of effective antitrust relief, patent holders are now on notice that unlawful agreements involving patents may well expose these patents to a charge of invalidity.

C. Estoppel

In the famous case of *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,⁶¹ the Supreme Court overruled its prior decision in *Triplett v. Lowell*,⁶² and held that a patentee whose patent had been held invalid could be estopped to thereafter pursue an infringement against a third party. The decision was premised on a number of factors, including economy of judicial time and the patentee having made his own choice of forum where he was prepared to "litigate to the finish against the defendant there involved."⁶³ The Court would apparently permit the patentee to relitigate validity only in those exceptional cases where the first court did not purport to employ the validity standards set forth in *Graham v. John Deere Co.*,⁶⁴ where the Court "wholly failed to grasp the technical subject matter and issues in suit,"⁶⁵ or where "without fault of his own the patentee was deprived of crucial evidence or witnesses in the first litigation."⁶⁶ "In the end," the Court said that the "decision will nec-

58. 382 U.S. 172 (1965). Prior to the *Glaxo* decision the Government had the right to bring a suit to cancel *ab initio* a patent that was obtained as a result of a fraudulent act committed on the Patent Office. See Note, *Patents, Fraud and the Antitrust Laws*, 37 GEO. WASH. L. REV. 168 (1968).

59. 395 U.S. 653 (1969).

60. 402 U.S. 313 (1971).

61. 402 U.S. 313 (1971).

62. 297 U.S. 638 (1936).

63. *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Foundation*, 402 U.S. 313, 332 (1971).

64. 383 U.S. 1 (1966).

65. 402 U.S. at 333.

66. *Id.*

essarily rest on the trial court's sense of justice and equity."⁶⁷

Two recent cases have shown a very strict interpretation of *Blonder-Tongue* by the lower courts in situations which would not appear to compel the application of an estoppel. In *Bourns, Inc. v. Allen-Bradley Co.*,⁶⁸ Bourns had filed a class infringement action in the Northern District of Illinois. Some of the claims⁶⁹ of the patent in suit had previously been held invalid by the District Court for the District of Nebraska,⁷⁰ and that decision was not appealed. The District Court for the Northern District of Illinois held that the class action was completely barred by the decision of the Nebraska Court, and granted the defendant's motion for summary judgment.⁷¹

On appeal, Bourns argued that an estoppel should not be applied to the claims that were not even adjudicated in the Nebraska case, and that, for several reasons, the Nebraska judgment should not operate as an estoppel even as to the claims that were held invalid. In support of the latter position, Bourns argued that it had intentionally avoided appealing the Nebraska decision because of the notorious invalidity record of the Eighth Circuit,⁷² and because Bourns was confident that, under the then-current decision in *Triplett v. Lowell*⁷³ it would not be estopped from bringing an action against other, more significant infringers in a more favorable forum. Although the Seventh Circuit agreed that Bourns was not estopped to assert infringement of the unadjudicated claims—a conclusion that seems obviously correct—in a 2-1 decision, the court refused to permit litigation of the claims that were held invalid in Nebraska. As justification for this holding, the court relied on the district court, which had observed that

appellants themselves chose the Nebraska forum; that the [Nebraska] court applied the Supreme Court standards of patent validity as enunciated in *Graham v. John Deere Co.* . . . ; that the [Nebraska] litigation involved a

67. *Id.* at 334.

68. 480 F.2d 123 (7th Cir. 1973).

69. 35 U.S.C. § 112 (Supp. 1972) provides that a patent application "shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." It is common for a patent to contain many claims, defining the invention in various ways.

70. *Bourns, Inc. v. Dale Electronics, Inc.*, 308 F. Supp. 501 (D. Neb. 1969).

71. *Bourns, Inc. v. Allen-Bradley Co.*, 348 F. Supp. 554 (N.D. Ill. 1972).

72. See notes 3-4 and accompanying text, *supra*.

73. 297 U.S. 638 (1936).

potential recovery by appellants of approximately \$1,000,000, and that "most if not all" of the evidence alleged by appellants to have been newly discovered was in existence and discoverable during the [Nebraska] litigation.⁷⁴

This result is unfortunate, and seems not only manifestly unjust, but also inconsistent with the Supreme Court's own decision in *Blonder-Tongue*, where an incentive to "litigate to the finish" in the first case was considered an overriding factor. In *Bourns*, there clearly was no such incentive where the appellant could rely on the earlier doctrine of *Triplett*, and could sue other defendants elsewhere while avoiding certain affirmance of its defeat in the Eighth Circuit. As lucidly pointed out in the dissenting opinion of Judge Pell, *Bourns* had every reason to rely on the established precedent of the Supreme Court in *Triplett* in ordering its affairs.

Perhaps an even more clearly unjust result was reached in the name of *Blonder-Tongue* by the Court of Appeals for the Fifth Circuit in the case of *Blumcraft of Pittsburgh v. Kawneer Co., Inc.*⁷⁵ That case involved a patent that had previously been held valid by the United States Court of Claims⁷⁶ and by the United States District Court for South Carolina.⁷⁷ The South Carolina decision was reversed, however, by the Fourth Circuit,⁷⁸ and the Supreme Court denied certiorari.⁷⁹

The district judge in *Kawneer* initially refused to grant summary judgment for the defendant on the basis of *Blonder-Tongue*, stating:

In the interest of justice, this court cannot place more weight on the decision of the Court of Appeals than on the decision of the Court of Claims in ruling on the defendants' plea for estoppel.⁸⁰

The district court finally relented,⁸¹ however, in the face of the per

74. 480 F.2d at 125.

75. — F.2d at —, 178 U.S.P.Q. 513 (5th Cir. 1973).

76. *Blumcraft of Pittsburgh v. United States*, 372 F.2d 1014 (Ct. Cl. 1967).

77. *Blumcraft of Pittsburgh v. Citizens and Southern National Bank of South Carolina*, 286 F. Supp. 448 (D.S.C. 1968).

78. *Blumcraft of Pittsburgh v. Citizens and Southern National Bank of South Carolina*, 407 F.2d 557 (4th Cir. 1969).

79. *Blumcraft of Pittsburgh v. Citizens and Southern National Bank of South Carolina*, 395 U.S. 961, *rehearing denied*, 396 U.S. 870, 949 (1969).

80. *Blumcraft of Pittsburgh v. Kawneer Co., Inc.*, 341 F. Supp. 1018, 1021 (N.D. Ga. 1971).

81. *Blumcraft of Pittsburgh v. Kawneer Co., Inc.*, 175 U.S.P.Q. 409 (N.D. Ga. 1972).

curiam affirmance of a decision on the same patent in the District of Kansas, holding the estoppel to be applicable.⁸²

In holding that the estoppel applies even after a holding of validity, the Fifth Circuit bluntly stated that

Blonder-Tongue did not throw merely a jab at the multiplicity of patent litigation; rather, it intended a knockout blow through the doctrine of collateral estoppel so that any time a patent was found invalid in a fair fight, the courts could count ten and the patent holder could no longer maintain that he was champion.⁸³

While appropriate to the result, the analogy of patent litigation to a prize fight where only one side can score a knockout hardly seems consistent with the Supreme Court's direction in *Blonder-Tongue* that the court's "sense of justice and equity" should prevail.

It has been suggested that the way to avoid the obvious unfairness of this situation is for a patentee to file a single class action against all infringers, so that he need only put his patent on the line once. While this may seem an attractive alternative, courts have recently begun to show an increasing reluctance to entertain class actions in patent cases.⁸⁴ It therefore appears that patentees will be required with increasing frequency to expose their patents to holdings of invalidity in multiple lawsuits with the knowledge that one such holding will totally destroy their property rights.

III. COPYRIGHTS

The right of Congress to enact federal copyright laws is provided by the same clause of the Constitution applicable to patents,⁸⁵ as is the case for the patent laws, Congress has enacted federal copy-

82. *Blumcraft of Pittsburgh v. Architectural Art Mfg., Inc.*, 337 F. Supp. 853 (D. Kan. 1972), *aff'd per curiam*, 459 F.2d 482 (10th Cir. 1972). Even in reversing itself, the district court refused to concede that its earlier analysis of *Blonder-Tongue* was incorrect.

83. 178 U.S.P.Q. at 518.

84. See *Sperberg v. Firestone Tire and Rubber Co.*, 178 U.S.P.Q. 556 (N.D. Ohio 1973); *Tracor, Inc. v. Hewlett-Packard Co.*, 176 U.S.P.Q. 505 (N.D. Ill. 1973); *In re Yarn Processing Patent Litigation*, 175 U.S.P.Q. 645 (S.D. Fla. 1972); *Technitrol, Inc. v. Control Data Corp.*, 164 U.S.P.Q. 552 (D. Md. 1970). *But see* *Dale Electronics, Inc. v. R.C. Electronics, Inc.*, 53 F.R.D. 531 (D.N.H. 1971); *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497 (N.D. Ill. 1969); *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.*, 285 F. Supp. 714 (N.D. Ill. 1968).

85. U.S. CONST. art. I, § 8.

right laws which provide for authors exclusive rights to their writings for a limited period of time.

Unlike the patent laws, however, the copyright statute expressly preserves the authors common law right of first publication. Section 2 of the Copyright Act⁸⁶ provides:

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.⁸⁷

Until recently, there was little question in any of the courts that the individual states had the right to preserve and protect the common law right of an author to be the first to publish his literary work. Indeed, the question of statutory or constitutional preemption was seldom, if ever, raised.⁸⁸

Recently, however, in *Goldstein v. California*,⁸⁹ the preemption question was considered and rejected by the Supreme Court. In that case, the Court was confronted with a direct attack on the constitutionality of a California tape piracy statute⁹⁰ which made it a crime to "pirate" the recordings produced by others.

The constitutional attack was made on two grounds. First, it was contended that the California statute established a state copyright law of unlimited duration, and thus conflicted with article 1, section 8, clause 8 of the Constitution—*constitutional preemption*. Secondly, it was argued that the California statute interfered with the federal policies inherent in the federal copyright laws—*statutory preemption*. Both arguments were rejected by the Court.

Perhaps the most significant aspect of the Court's decision in *Goldstein* is the outright rejection of the constitutional preemption doctrine. In this regard the Court observed that:

86. 17 U.S.C. § 2 (1970).

87. *Id.* The common law patent counterpart to the right of first publication in the copyright law is the right of an inventor to maintain his invention as a trade secret. Unfortunately, Congress has never chosen to preserve the common trade secret right in express terms in the patent laws.

88. In *Edgar H. Wood Associates, Inc. v. Skene*, 347 Mass. 351, 197 N.E.2d 886 (1964), the notion that state protection extended through common law copyright was preempted by the federal copyright laws or by the constitution was summarily rejected.

89. 41 U.S.L.W. 4829 (U.S. June 19, 1973) (No. 71-192).

90. CAL. PENAL CODE § 653h (West 1972).

Although the copyright clause thus recognizes the potential benefits of a national system, it does not indicate that all writings are of national interest or that state legislation is, in all cases, unnecessary or precluded.⁹¹

Undoubtedly, the express rejection of the constitutional preemption doctrine in *Goldstein* should be of assistance to the Court in resolving the identical issue (in a patent-trade secret context) in *Kewanee*.⁹²

At the same time, the Court in *Goldstein* held that Congress and the states had "concurrent" power to act in the copyright field, and thus rejected the statutory preemption argument urged by the petitioners as well. The most troublesome aspect of the *Goldstein* decision, from the standpoint of a reversal of *Kewanee*, is that the Court premised its finding of no statutory preemption on the understanding that a conflict would indeed exist "if a State attempted to protect . . . that which Congress had protected."⁹³ Since the court in *Kewanee* limited its application of the preemption doctrine to trade secrets that could arguably have been the subject of patent protection, the *Goldstein* decision may well be distinguishable, at least in its literal holding, from *Kewanee*.

While *Goldstein* expressly preserves the continuing right of the states to protect common law copyrights and to enact legislation prohibiting tape piracy, the decision may well be of limited precedential value in urging the reversal of *Kewanee* in the trade secret area.

As one Illinois appellate court has noted, Illinois state courts have not been an extensive forum for the litigation of matters relating to common law copyrights.⁹⁴ Until the recent decision in *Roberts v. Dahl*,⁹⁵ no significant authority in the common law copyright field existed in Illinois.

91. 41 U.S.L.W. at 4832.

92. It should be noted, however, that the *Kewanee* case presents a much more difficult problem than *Goldstein*. In *Goldstein*, the Court seemed to premise its non-constitutional preemption holding on the fact that the federal copyright laws did not encompass the activity prohibited by the California statute. In contrast, the court in *Kewanee* expressly limited its preemption ruling to subject matter within the scope of the patent laws, *i.e.*, subject to patent protection.

93. 41 U.S.L.W. at 4833.

94. *Roberts v. Dahl*, 6 Ill. App. 3d 395, 401, 286 N.E.2d 51, 55 (1972).

95. 6 Ill. App. 3d 395, 286 N.E.2d 51.

In that case, the appellate court sustained the entry of summary judgment against an alleged owner of a common law copyright on the ground that the alleged proprietary material had been "independently developed" by persons other than the plaintiff.⁹⁶ As is the case for trade secrets, an action for common law copyright misappropriation is dependent upon the actual copying or misappropriation of the efforts of another.⁹⁷ The mere fact that two conflicting works are similar is not alone sufficient to establish liability. Rather, as the court correctly held in *Dahl*, even exact identity between two materials is not sufficient to establish plagiarism so long as the conflicting materials were developed independently.⁹⁸

The *Dahl* decision correctly recognizes the existence of common law rights in unpublished literary property. Moreover, the *Dahl* decision further recognizes that a right of action exists for misappropriation of unpublished literary property. But, at the same time, the court in *Dahl* correctly recognized that "independent development" is a complete defense to a charge of common law copyright misappropriation, and that summary judgment is entirely appropriate where uncontradicted evidence of "independent development" exists in the record.

IV. CONCLUSION

Recent developments in the field of intellectual property have consisted, by and large, of a further erosion of the rights of the creator of such property. The Sixth Circuit has flatly invalidated all of its trade secret laws. One entire area of technology—computer programs—has been read out of the patent system. A patentee must engage in a veritable game of chance, sometimes against the overwhelming odds of an unfavorable circuit, in order to enforce his patent. These odds worsen if he must sue multiple defendants in different circuits, where one holding of invalidity estops him from further litigation. While a class action provides a vehicle for improving these odds, courts are becoming more reluctant to entertain this sort of action in patent cases.

96. 6 Ill. App. 3d at 402, 286 N.E.2d at 55.

97. *Id.*

98. *Id.* See also *O'Rourke v. R.K.O. Radio Pictures Inc.*, 44 F. Supp. 480, 482 (D. Mass. 1942).

Truly, the area of intellectual property is one of rights in siege. Unless the Supreme Court takes firm action to correct the chaos in the lower courts—a decidedly unlikely occurrence—only a thorough review by Congress of the laws in this area can provide relief from the uncertainty facing the owner of intellectual property.⁹⁹

99. Ironically, it is only in the area of the Copyright Laws that basic revision is presently under review. S. 1361, 93rd Cong., 1st Sess. (1973). This is the one area of intellectual property law that has been relatively free of turmoil.